

Baskin, P.L.I

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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of HEW Contract Award]

FILE: B-195792

DATE: August 18, 1980

MATTER OF: New York University

DLG05104

DIGEST:

1. In considering objections to technical evaluation of proposals GAO function is not to evaluate proposals, but to examine record and consider whether agency's determinations have been clearly shown to have no rational bases. GAO will consider meaning of solicitation provisions when reviewing technical evaluations.
2. In absence of allegations of fraud, bad faith, or conflict of interest, GAO will not review qualifications of agency technical evaluation panel members.
3. Where RFP provides for evaluation of experience in breeding and maintenance of sub-human primate colony, it does not impose requirement that offerors have specific experience with hepatitis, although an offeror showing such experience could receive higher evaluation score.
4. Absence of specific experience may not result in finding that offeror is nonresponsible when RFP provides for measurement of experience as part of technical evaluation of proposals.
5. RFP requirement that offerors demonstrate safety standards, when reasonably interpreted, requires offerors to show existence of safety standards to be followed in performing contract but does not require submission of evidence of prior adherence to such standards.

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6. Allegation that proposal should have been rejected because offeror could not meet requirement to maintain acceptable breeding rate of ten pregnancies per year is without merit where RFP does not impose that specific requirement and where evaluators, in considering experience, resources and facilities as provided by RFP evaluation scheme, reasonably found that offeror had necessary experience, resources and facilities to meet contract requirements, including maintenance of acceptable breeding rate.
7. Agency was not required to comprehensively consider offeror's ability to transport chimpanzees in compliance with applicable laws and regulations where RFP, reasonably interpreted, requests offerors to submit plan for relocating animals but imposes no specific requirement that offerors demonstrate how they would comply with any applicable legal requirements.
8. Agency cost evaluation, although not as in-depth as it might have been, is not legally objectionable where under circumstances it appears to adequately support conclusion that awardee could meet all requirements at substantially lower cost than could competitor.
9. In performing cost evaluation, agency need not equalize each offeror's technical approach, but need only determine realism of costs associated with particular effort proposed.

New York University protests the award of contract No. N01-HB-9-2910 to Southwest Foundation for Research and Education (SFRE) by the Department of Health, Education and Welfare (HEW) for the breeding and maintenance of a Government-owned chimpanzee colony.

This protest is also the subject of related litigation (New York University v. Califano, 79 Civ. 3881 (LPG)) in the United States District Court for the Southern

AGC 20222

District of New York. The court has expressed an interest in a decision by our Office. Therefore, we will consider the protest on the merits. 4 C.F.R. § 20.10 (1980); Reliable Trash Service, B-194760, August 9, 1979, 79-2 CPD 107. Furthermore, we will consider issues that HEW asserts are untimely raised, as is our policy when a court expresses interest in our decision. National Ambulance Service of Louisiana, B-193447, January 22, 1979, 79-1 CPD 40.

BASIS FOR PROTEST

NYU's primary objection is to the evaluation of SFRE's proposal. NYU believes that the SFRE proposal was unacceptable and that HEW arbitrarily interpreted various aspects of the RFP in order to conclude that the SFRE proposal was acceptable. NYU further complains about the qualifications of the technical evaluators and about the agency's failure to conduct a comprehensive cost analysis. We find the protest to be without merit.

BACKGROUND

In order to encourage hepatitis studies by independent investigators, HEW's National Heart, Lung, and Blood Institute supports a breeding colony of chimpanzees that can be used as a model for humans. The RFP solicited offers for a cost-type contract for breeding and maintenance of the chimpanzee colony. NYU was the incumbent contractor under a five-year contract for similar services awarded in 1974.

The description of work for the contract read as follows:

"The contractor will develop and operate a station for breeding and holding the NHLBI chimpanzees. It is expected that the breeding panel will initially comprise 20 adults and 5 adult males, while the experimental panel will include 20 juvenile females and 19 juvenile males. The breeding facilities may consist of semi-free-ranging system, a series of cages, or a combination of these.

The breeding stock should produce approximately ten pregnancies per year. The resulting infant chimpanzees will be incorporated into the experimental animal panel at 12 months of age. The experimental animals must be contained within an area designed to allow for surveillance and control. Isolation and containment of the animals are essential; the area's suitability for keeping chimpanzees in and people out must be demonstrated. Appropriate safety standards to protect personnel and avoid cross-contamination of animals must be demonstrated."

The RFP advised that award of the contract would be made to the "technically acceptable offeror whose total proposal offers the greatest advantage to the Government considering technical merit, probable cost and other factors." The offerors were further informed that a proposal that exceeded the Government's technical requirements would not be selected unless it was considered advantageous to the Government. The methods and criteria for the review of proposals were described as follows:

"Technical Proposals submitted in response to this solicitation will be reviewed by a panel composed totally or predominately of non-Government members and subsequently by a review group from within the National Heart, Lung, and Blood Institute which will include the Contracting Officer or his representative. Technical Proposals will be evaluated in accordance with the following criteria.

1. Institutional Experience - Previous experience in the specific area of breeding and maintaining a sub-human primate colony. (45%)
2. Facilities and Resources - Evidence of existing facilities and resources for the safe breeding, maintenance, and handling of the specified number and type of animal population. This

includes, but is not limited to, supportive services such as laboratory and surgery. (30%)

3. Personnel - Evidence that scientific and technical support personnel are available with the qualifications and experience needed to staff or support the facilities and resources specifically proposed. (25%)

"Business proposals will be evaluated to: (1) Determine the realism of the proposed cost/price; (2) Assess the propriety of the specific elements of the proposed cost/price; and (3) Determine the probable total estimated cost to the Government, including any improvements which may be required by the Government. This evaluation will also include past performance, ability to do the work in the specified time, and financial resources."

Three proposals were submitted in response to the RFP. The proposals of NYU and SFRE, the two offerors determined to be within the competitive range, received technical scores of 87 and 86.4, respectively. After holding discussions and evaluating best and final offers, HEW determined that both proposals were technically equal and awarded the contract to SFRE because of its substantially lower cost proposal.

STANDARD OF REVIEW

Before discussing the specific grounds of protest, we must point out the standard of review that we have applied to determine the propriety of the award to SFRE since NYU argues that we should not adhere to what NYU apparently believes is our normal practice of deferring to the agency in this type of case. It is not our function to make determinations as to the acceptability or relative merits of technical proposals. Joanell Laboratories, Inc., 56 Comp. Gen. 291 (1977), 77-1 CPD 51. This does not mean, however, that we defer totally to the agency. Rather, we examine the record to determine whether

the judgment of the contracting agency was clearly without a rational basis. Joanell Laboratories, Inc., supra at 294. Unless such a finding is made, or there is an abuse of discretion, or a violation of procurement statutes or regulations, that judgment will not be disturbed. See Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458.

[Much of NYU's protest is based on differences of opinions with HEW as to what the RFP requires.] We do carefully review agency evaluations in light of the meanings that reasonably may be attributed to solicitation provisions, Standard Conveyor Company, 56 Comp. Gen. 454 (1977), 77-1 CPD 220; The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15, and we have done so here.

THE EVALUATION

A. The Review Panels

HEW used a two-level process to evaluate technical proposals. First, proposals were evaluated by a review panel composed of non-Government consultants (peer reviewers) who, HEW states, are recognized experts in fields related to this solicitation. Subsequent review was by a panel composed of HEW program staff members and the contracting officer's representative.

NYU asserts that the peer reviewers were not recognized experts in the fields related to this contract and therefore were not qualified to judge the merits of the proposals. In support of this argument, NYU alleges that three of the five reviewers had not published any papers on chimpanzees, hepatitis, or the use of chimpanzees in hepatitis research, and none had published any papers or had any significant experience in breeding chimpanzees.

[The composition of a technical evaluation panel is within the discretion of the contracting agency, and absent allegations of fraud, bad faith, or conflict of interest, is not a matter appropriate for review by this Office.] University of New Orleans, B-184914, May 26, 1978, 78-1

CPD 401; Gloria G. Harris, B-188201, April 12, 1977, 77-1 CPD 255. Here, NYU presents no such allegations, and we see no reason to further consider the matter.

B. Technical Evaluation

NYU raises several objections to the evaluation of the SFRE proposal. First, NYU alleges that SFRE did not have relevant experience for this contract. Second, NYU asserts that SFRE did not meet the requirement to demonstrate safety standards. Third, NYU states that SFRE cannot produce the ten chimpanzee pregnancies per year mentioned in the RFP. Fourth, the protester complains that the contracting officer failed to consider the hazards involved in the transporting of chimpanzees from New York to Texas which would become necessary by award to SFRE. Throughout, NYU alleges that the contracting officer arbitrarily interpreted the RFP in order to ignore the weaknesses in the SFRE proposal.

Experience

NYU asserts that experience in dealing with hepatitis in non-human primates is a basic prerequisite for the contract because, for example, of the requirements to maintain an experimental panel of infectious and non-infectious animals and to insure isolation, containment and safety of the animals. NYU asserts that SFRE has no experience in hepatitis research.

[The RFP, however, did not require an offeror to have previous experience with hepatitis in non-human primates.] As HEW points out, [the RFP required an offeror to have facilities and resources to support the specific number and type of animal population, but otherwise indicated only that experience would be evaluated "in the specific area of breeding and maintaining a sub-human primate colony."] While specific hepatitis-related experience might result in a more favorable evaluation -- indeed, the record here shows that the evaluators noted NYU's hepatitis experience and scored the NYU proposal several points higher than the SFRE proposal in the experience category -- it was obviously not a mandatory requirement for contract

award, but only a factor which would be considered in the evaluation. Thus, we cannot agree that HEW arbitrarily interpreted the RFP in this regard.

Moreover, while NYU suggests that SFRE could not be a "responsible" offeror because of its lack of specific hepatitis experience, in this case it is clear that experience was to be measured as part of the technical evaluation, as is permitted in negotiated procurements of this type, rather than as part of a responsibility determination. In any event, even if a responsibility finding here encompassed experience considerations, we would not review HEW's determination that SFRE is responsible since, as indicated above, the RFP did not establish specific hepatitis experience as a prerequisite to award and it is our policy not to review affirmative responsibility determinations in the absence of such a prerequisite. See, e.g., Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

Safety Standards

NYU argues that SFRE did not demonstrate safety standards to protect personnel and to avoid cross-contamination of animals as specifically required by the RFP. The protester points out that the peer reviewers found specific fault with some of SFRE's safety standards and had to rely on hearsay evidence of compliance with others. For example, the evaluators reported that "it is said that care is taken to minimize cross-exposure of animals to personnel." In contrast, the reviewers said "NYU provided superior evidence of extensive successful experimentation in viral hepatitis studies without any cross-contamination of animals or personnel."

The statement of work in the RFP did provide that "[a]ppropriate safety standards * * * must be demonstrated." NYU seems to take the position that this means an offeror had to provide conclusive evidence of adherence to safety practices that would avoid contamination. We think that is too strict an interpretation. Under the circumstances, where a comparative evaluation of proposals from offerors with potentially varying experience levels was to be made, we believe the more reasonable interpretation of the RFP

is that an offeror had to show the existence of safety standards to which the offeror would adhere during contract performance and which would preclude or minimize infection of humans or other animals.

NYU, with a good track record as the incumbent contractor, was able to show more than that, and was duly credited by the evaluators, although NYU's score in the facilities category also reflects the evaluators' expressed concern that unsealed cement block, cracked seams, and chipped paint in wall panels at the NYU facilities were potential contamination hazards. SFRE, which did not have NYU's specific experience, did not provide the same conclusive evidence as NYU did, but demonstrated to the satisfaction of the evaluators that "appropriate" safety standards did indeed exist. For example, SFRE's proposal describes elaborate regulations for the protection of personnel, restrictive access to the animal areas and other protections against contamination. We believe the evaluators were not precluded by anything in the RFP from considering this and other information provided by SFRE as demonstrating the existence of safety standards.

Pregnancies

NYU alleges that SFRE cannot produce the approximately ten pregnancies per year required by the RFP. It argues that approximately 25 percent of the requirements would be lost in the first year because of the six month quarantine period enforced after relocation and the stress of relocation on the animals. It further maintains that even this 75 percent level will not be achieved because of (a) SFRE's use of the harem breeding method instead of the monogamous approach to which the chimpanzees had been accustomed and which NYU believes is more effective; and (b) SFRE's inability to successfully breed chimpanzees born at SFRE from late 1976 - 1978.

During the course of this procurement it appears that both SFRE and the evaluators may have considered ten pregnancies a year to be a contract requirement. For example, SFRE indicated it would produce ten infant chimpanzees per year "to satisfy the requirements of the contract," and the evaluators noted their expectation that SFRE would in fact

produce "the required ten offspring per year." The RFP itself, however, does not impose any such requirement. It merely calls for the contractor to "support * * * a breeding colony" and anticipates that the breeding panel would produce approximately ten pregnancies per year. Thus, [we agree with HEW's statement in response to the protest that the production of 30 pregnancies over the three-year contract period was not the underlying objective of the contract.]

Nonetheless, proposals were evaluated with an acceptable breeding rate of approximately ten pregnancies per year in mind, and the question before us simply is whether HEW arbitrarily determined that SFRE's proposal was acceptable in this regard.

The record shows that the evaluators carefully considered this aspect of the SFRE proposal. SFRE's initial proposal indicated the possibility of a slightly lower breeding rate during the first year of the contract, but also suggested methods of minimizing that possibility. In response to questions from HEW, SFRE indicated that if necessary it would provide infants from its own breeder panel to make up any deficit incurred with HEW's panel. The evaluators noted that SFRE would utilize the harem breeding approach, further noted that SFRE offered to utilize its own chimpanzees if needed and that "[b]reeder buildings * * * specifically designed and constructed for chimpanzees have been successfully used for chimpanzee production," and concluded that the facilities and resources of SFRE were "highly adaptable to the requirement of this contract project." They further concluded:

"SFRE does have adequate experience in methodology for breeding chimpanzees * * *.

* * * * *

"The breeding performance of the SFRE chimp colony is considered good as indicated by data presented at the site visit. The continuation of satisfactory production by the transferred

breeder panel is expected, although a slight decrease in the first year from its present production level is considered possible.

"Based on the previous experience and present activity involving chimpanzee breeding and experimental use, it is reasonable to expect accomplishment of the required ten offspring per year. SFRE has, in fact, presently an equivalent size breeder program which exceeds the projections of this proposal."

[Although NYU vigorously asserts that HEW had no basis for concluding that SFRE could maintain an acceptable breeding rate, and although the evaluators were certainly concerned with that aspect of performance, it is important to note that the breeding rate was not a specific evaluation factor and therefore properly was not treated as a specific independent evaluative concern.] Rather, because it was related to contract performance, it was considered in connection with the evaluation factors set forth in the RFP. Thus, what the evaluators did was determine whether an offeror had the experience, facilities, and resources and personnel to accomplish the purposes of the contract. In so doing, the evaluators concluded that SFRE had the relevant experience, had the appropriate facilities, and planned to utilize personnel with experience in the "care and breeding of chimpanzees and other apes." While it is apparent that NYU does not agree with these conclusions, we cannot find from this record, which includes the SFRE proposal, negotiation correspondence between SFRE and HEW, and the evaluation report, that the evaluators' conclusions were without a rational basis.

Hazards of Transportation

NYU contends that the contracting officer did not fully consider the legal and biological implications of transporting the animals from New York to Texas until after award, in contravention of a reasonable interpretation of the RFP. In this respect, NYU argues that SFRE's proposal did not indicate compliance with various laws and regulations governing transportation of non-human primates.

The RFP contained the following provision:

"I. Relocation of Colony

The NHLBI Chimpanzee Colony is presently housed at the Laboratory for Experimental Medicine and Surgery and Primates, Sterling Forest, New York. The successful offeror may be requested to arrange for the relocation of these animals to his site and to charge the associated costs to the awarded contract. Therefore, as a severable part of the technical and business proposals, the offeror shall describe:

- (1) How the offeror would move the animals.
- (2) * * * the health risks to chimpanzees, people and the environment, and how they would be dealt with.
- (3) The anticipated impact on the breeding panel in terms of reproduction rates.
- (4) The costs involved and time required to relocate the colony."

[HEW reports that relocation of the chimpanzees was considered, that SFRE presented an acceptable plan to move the animals, and that HEW found no reason to conclude that SFRE would not be able to transport the animals while complying with all applicable laws and regulations.] HEW further reports that, in response to the protest, it checked with the Departments of Agriculture and the Interior and was advised that the various statutes and regulations administered by those Departments either did not apply or would not prohibit the shipment. Finally, HEW states that after award to SFRE the chimpanzees were moved without incident and that all animals arrived in good health.

[The evaluation record does not reflect any particular evaluation concern with the transportation of the animals.] The contracting officer explains that the review panel included people who were familiar with what was involved in the inter-state shipment of primates and that the panel

simply did not identify any deficiency in the SFRE transportation proposal. The contracting officer further reports that he did consider transportation aspects prior to making the award and found that SFRE's relocation plan was acceptable, that the Foundation had the experience and the capacity to move the chimpanzees, and that "there was no apparent reason why the relocation could not be accomplished" by SFRE in accordance with all legal requirements.

It is clear that the agency did not comprehensively examine into SFRE's ability to meet legal requirements applicable to the relocation shipment. It is just as clear, however, that the RFP neither required from offerors specific information on this aspect of such a move nor provided for specific HEW evaluation of that aspect. In our view, the RFP sought to insure that offerors other than NYU would recognize the need for relocation and would be prepared to handle such a move, while identifying the impact of the move with respect to both technical (e.g., health, breeding) areas and cost. Although HEW could have concerned itself with the specific legal requirements governing the move and carefully examined into an offeror's plan to meet each such requirement, we know of nothing requiring HEW to have done so and we see nothing in the RFP which, reasonably interpreted, suggests that HEW would do so. Thus, we believe evaluation of SFRE's relocation plan without regard to its specific demonstration that it could comply with whatever laws and regulations were applicable was not inconsistent with the RFP.

C. Cost Evaluation

NYU asserts that HEW failed to make a proper cost evaluation, and claims that had it done so, the difference between the NYU proposal of \$1,156,953 and the SFRE proposal of \$508,918 would have proven to be mostly illusory. In this regard, NYU states that its proposed costs and those of SFRE were for significantly different work, that is, NYU proposed costs based on continuing with the work called for by its contract, while SFRE supposedly based its costs on a more limited scope.

HEW reports that it evaluated both cost proposals and, in light of SFRE's lower costs, examined SFRE's proposal to

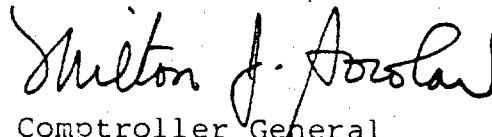
see that all requirements were costed. It further reports that it found all requirements were costed, that the large difference in proposed costs was based on NYU's "higher core facility cost" and excessive use of labor, and that in light of the existence of a technically acceptable proposal that was approximately half as costly as NYU's, it did not review the NYU proposal on a "cost-by-cost basis."

We find no basis to object to HEW's actions. An agency's evaluation of competing cost proposals involves the exercise of informed judgment which we will not disturb unless there is clearly no reason for it. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Here, the record shows that HEW examined SFRE's proposed costs, questioned some aspects of SFRE's cost proposal during negotiations, and concluded that SFRE could meet the Government's requirements in a technically acceptable manner at its proposed costs. Although the record does not indicate that HEW performed an in-depth cost analysis or independently verified each item of proposed expense in the proposals, such an analysis is not always necessary and HEW could rationally conclude, on the basis of the examination it did make, that award to SFRE would result in substantially less cost to the Government than would award to NYU. See Grey Advertising, Inc., *supra*, 55 Comp. Gen. at 1133. In this connection, we find nothing in the record to refute HEW's position that NYU's core facility costs were high or that it gave NYU an opportunity to reduce its labor costs, which NYU declined to do. We point out, moreover, that while it may be true that NYU offered more than did SFRE, HEW was not required to equalize the two proposals as part of the cost evaluation. Rather, HEW was required only to make a cost realism determination with respect to what each offeror proposed. Since SFRE's proposal was found to be acceptable and consistent with the RFP, HEW was not required, when evaluating that proposal, to factor in costs representing whatever additional effort NYU would put forth if it received the contract.

CONCLUSION

For the reasons discussed above, we find that HEW had a reasonable basis for evaluating proposals as it did, that

it did not arbitrarily interpret the RFP or otherwise act arbitrarily or capriciously in evaluating proposals, and that there is a rational basis for the selection decision. Accordingly, the protest is denied.

A handwritten signature in dark ink, appearing to read "Milton J. Arnold". The signature is written in a cursive, flowing style with a large initial 'M'.

For The Comptroller General
of the United States